No. 92-515

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner.

VS.

TODD MITCHELL,
Respondent.

On Writ Of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER THE STATE OF WISCONSIN

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

United States Constitution

Statutes and Regulations

TABLE OF AUTHORITIES

Legislative Materials

Other Authorities

TABLE OF AUTHORITIES

OTHER AUTHORITIES

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I

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("the Lawyers' Committee") submits this brief as *amicus curiae* in support of Petitioner, the State of Wisconsin.

The Lawyers' Committee is a legal services organization which, since 1968, has served communities traditionally under-represented within our society. A primary mandate of the Lawyers' Committee is to provide free legal services to individuals and communities, usually poor, who have experienced discrimination because of their race, ethnicity, national origin, color or immigration status. For almost twenty-five years, the Lawyers' Committee has worked closely with communities of color and immigrant and refugee communities to ensure that these communities' civil rights are sufficiently protected and fully enforced.

In 1991, the Lawyers' Committee initiated its Racial Violence Project. The Racial Violence Project is a multifaceted effort to

address both the causes and effects of racially motivated violence throughout the San Francisco Bay Area. The Project's primary efforts include providing public education about and encouraging utilization of California's hate violence and hate crime laws.

The case of *Wisconsin v. Mitchell*, 485 N.W.2d 807 (Wis. 1992) ("*Mitchell*") raises issues of great importance to the clients served by this *amicus curiae*. In *Mitchell* the Wisconsin Supreme Court overturned one of that state's laws punishing hate crimes. California, along with some 30 other states, has enacted substantially similar legislation aimed at punishing hate crimes. These laws, in California and elsewhere, are vital forces in safeguarding the civil rights of individuals from traditionally underrepresented communities. The laws were enacted to combat the increasing incidence of discriminatory or bias-motivated actions and generally are drafted in a manner that guarantees no impingement of First Amendment rights.

Due to the similarity between the Wisconsin and California statutes in particular, this Court's scrutiny of the *Mitchell* decision will have a direct impact on the viability of California's hate crimes laws as well as the interests of the clients of this *amicus curiae*.[1]

II

INTRODUCTION

What is a hate crime? In October 1992 the United States House of Representatives defined the term as "a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice."[2] Does such a crime constitute an exercise of protected speech or is it unprotected discrimination? The Wisconsin Supreme Court in *Mitchell* found it was the former. Does a sentence enhancement based on such conduct violate a defendant's right to freedom of "thought?" The Wisconsin Supreme Court found that it did.

A simple review of the facts, before we even reach this Court's First Amendment jurisprudence, aptly illustrates the Wisconsin Supreme Court's errors. On October 7, 1989 a group of young African American men and boys were gathered at an apartment complex in Kenosha, Wisconsin. *Mitchell*, 485 N.W.2d at 809. Todd Mitchell was a member of the group. During the evening the group discussed a scene from the movie "Mississippi Burning" where a white man beat a young African American boy. The discussion of the movie eventually led to a remark by Mitchell: "Do you feel all hyped up to move on some white people?" As Gregory Reddick, a 14 year old white male approached, the group continued to discuss finding and assaulting white people. When the group spotted Reddick it descended upon him, battering him brutally and leaving him with serious and permanent injuries. *Id.*

The conduct at issue in *Mitchell*, the discriminatory infliction of crime, is not a phenomenon limited to race or ethnicity. As is evident by a multitude of federal and state antidiscrimination laws, hateful acts of prejudice spread to the realms of religion, gender, national origin, sexual orientation and disability. The San Francisco Bay Area, like the rest of the country, has experienced an alarming number of incidents aimed at gays and lesbians in addition to an increase in the number of incidents aimed at members of other classes.

Do laws which aim to punish and deter this discrimination infringe on First Amendment rights? *Amicus curiae* submits that they do not. None of the conduct targeted by hate crimes laws such as Wisconsin's constitutes an exercise of First Amendment rights. The criminalized conduct is discrimination and should be dealt with as such. *Amicus curiae* urges this Court to reject the *Mitchell* court's elevation of discrimination to protected expression.

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[1] Presently, at least four cases focusing on the constitutionality of California's hate crime statutes are pending in the California courts. All involve hate crimes inflicted upon gay victims. *See infra* note 8.

[2] H.R. 4797, 102d Cong., 2d Sess. (1992). This definition arises from a bill directing the United States Sentencing Commission to make sentencing guidelines for federal criminal cases. Specifically, Congress directed the Commission to "provide sentencing enhancements of not less than 3 offense levels for offenses that are hate crimes."

Congress' full definition of "hate crime" was:

> [A] crime in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals.

Id.

III

SUMMARY OF ARGUMENT

A. THE COUNTRY HAS A COMPELLING NEED FOR HATE CRIME STATUTES.

> Experience teaches that racial violence has a broadly inhibiting effect upon the exercise by members of the Negro [sic] community of their Federal rights to nondiscriminatory treatment. Such violence must, therefore, be broadly prohibited if the enjoyment of those rights is to be secured.[3]

Though clearly not a new phenomenon, the occurrence of "hate violence" and "hate crimes" is on the rise throughout the country.[4] A variety of theories have been advanced about the causes of this recent increase in bias-motivated activity, from the national economic downturn to a lack of political leadership on issues of diversity.[5] However, none of these theories disputes the fact that such incidents are indeed increasing in frequency.[6] In San Francisco alone, according to statistics compiled by the San Francisco Police Department's Hate Crimes Unit, there was a total of 401 incidents of hate violence and crime reported to the police during 1991.[7] Our common experience informs us that the figure is significantly greater since most incidents remain unreported to the police for a variety of cultural and political reasons.[8]

In response to this growing and devastating societal problem (and in response to the recommendations of its Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence),[9] the California legislature passed civil and criminal statutes which provide remedies to victims as well as recourse for the State against perpetrators of hate violence and hate crime. *See, e.g.*, Cal. Penal Code §§ 422.6 and 422.7 (West 1992); Cal. Civ. Code §§ 51.7 and 52.1 (West 1992). In California, as in

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[3] S. Rep. No. 721, 90th Cong., 2d Session, *reprinted in* 1968 U.S.C.C.A.N. 1837, 1842 (1969).

[4] The terms "hate violence" and "hate crime" are generally understood to encompass harassing, intimidating, violent behavior and conduct motivated by bias or discrimination. *See California Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence*, Final Report (Apr. 1990); H. Ehrlich, *Campus Ethnoviolence and the Policy Options*, National Institute Against Prejudice & Violence, Report No. 4 (Mar. 1990). *See also* H.R. 4797, *supra*.

[5] At least in California, the pressures accompanying the huge growth of the State's minority population are certainly a leading factor of the increase in hate crimes. *See* McLeod, *State's Astonishing Population Changes Likely To Mean More Minority Representation in Legislature*, San Francisco Chronicle, Feb. 26, 1991, at A1. As of the 1990 census, minorities made up 43% of the State's population, a rise of 10% from a decade ago. *Id.* Over the span of a decade, the Hispanic population grew by 70% to 7.6 million and the Asian population more than doubled to 2.8 million. *Id.* Nearly 4 in 10 Asian Americans live in California with the largest numbers concentrated in counties surrounding San Francisco and Los Angeles. *Id.* Similarly, California is home to 40% of the Hispanics living in the United States. *Id.*

[6] *See 1991 Audit of Anti-Semitic Acts*, Anti-Defamation League (1992); *California Attorney General's Report, supra*; P. Ephross, A. Barnes, H. Ehrlich, K. Sandnes, and J. Weiss, *The Ethnoviolence Project—Pilot Study*, National Institute Against Prejudice & Violence, Report No. 1 (1986); J. McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts* 1983-1987 (1989).

[7] Memorandum re Yearly Recap of Hate Crimes Statistics 1991, from Officer S. Bargioni of the Hate Crimes Unit of the San Francisco Police Department to Captain J. Willet, Commanding Officer, Special Investigations Division of the San Francisco Police Department (Jan. 16, 1992).

[8] Local examples of hate violence and hate crimes which have been reported include:

- —an attack on an African American couple in Fremont by a man wielding a tree limb, calling them derogatory names and demanding they get out of the neighborhood;
- —ongoing harassment of a Puerto Rican family in San Francisco by a neighbor, which included broken glass in their driveway and on their front porch, racial epithets being spray painted on their vehicles, tire slashing and threats of physical violence against the children of the family;
- —at least three separate cases in the past year in which gay men were battered because of their sexual orientation and the defendants' sentences enhanced pursuant to California's hate crimes laws. *See California v. Mearra*, Cal. Super. Ct. No. 116304, Cal. App. Ct. No. A055072 (pending before the First App. Dist.); *California v. Joshua*, Cal. Super. Ct. No. 95693, Cal. App. Ct. No. H008944 (pending before the Sixth App. Dist.); and *California v. Schwarz*, Cal. Super. Ct. No. 145513, Cal. App. Ct. No. A059514 (pending before the First App. Dist.)

[9] *California Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence*, 1986 Report.

other states, the enhancement statute, Penal Code section 422.7, is a necessary component of the larger scheme of civil rights laws.[10]

B. ENHANCEMENT STATUTES, SUCH AS WISCONSIN'S SECTION 939.645, DO NOT IMPLICATE NOR VIOLATE THE FIRST AMENDMENT.

Based in part on this Court's recent decision *R.A.V. v. City of St. Paul*, ____ U.S. ____, 112 S. Ct. 2538 (1992) ("*R.A.V.*"), the Wisconsin Supreme Court found that the enhancement of Mitchell's sentence was an impermissibly "content-based" prohibition on his First Amendment right to free speech. *Mitchell*, 485 N.W.2d at 815. Wisconsin's reliance on *R.A.V.* to determine the validity of its enhancement statute is misplaced. In *R.A.V.*, this Court found facially invalid a local "fighting words" ordinance which specifically prohibited the expression of certain viewpoints.

Enhancement statutes such as Wisconsin's are distinctly different from "fighting words" statutes (like the one at issue in *R.A.V.*) because they criminalize activity on a content-neutral basis and punish only conduct. The First Amendment is not even implicated by the statutes because they do not regulate, nor interfere with, the right to free expression. Rather, the statutes' aim as well as their effect is to prohibit *discrimination*, a legislative goal that is compelling.

Even assuming that expressive rights are peripherally implicated by the enforcement of the statutes, it is clear that hate crimes enhancement statutes are content-neutral laws which only secondarily affect conduct's expressive content. As such, they pass constitutional muster under the well-established test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

Accordingly, this Court should determine that Wisconsin's enhancement statute, Wisconsin Statute section 939.645 (West 1991) ("section 939.645"), is constitutional.

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[10] *See supra* note 8 (describing the *Mearra, Joshua*, and *Schwarz* cases).

IV

ARGUMENT

A. NO FIRST AMENDMENT SCRUTINY SHOULD BE APPLIED TO SECTION 939.645 BECAUSE IT IS A GENERAL CRIMINAL STATUTE PROHIBITING CONDUCT THAT NEITHER AIMS AT NOR AFFECTS EXPRESSIVE ACTIVITY.

The *Mitchell* court errs in applying the First Amendment where the First Amendment simply does not apply. Section 939.645 is a penalty enhancement statute, mandating increased penalties when already criminal conduct, such as assault, battery, or murder, is inflicted in a discriminatory fashion—*i.e.* because of the victim's membership in an identifiable class of persons. As such, the statute enhances the penalty for conduct: discrimination.

Section 939.645 provides for the enhancement of certain crimes if a person:

> Intentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Wis. Stat. § 939.645.[11] The statute is nearly identical to the statute in California which provides for an enhancement if:

> [T]he crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation . . . .

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[11] Section 939.645 carefully excludes its application when the underlying crime itself is one that aims at discrimination. Section 939.645(4) provides: "This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction of that crime." Thus, the statute avoids the imposition of any sort of "double" punishment.

Cal. Penal Code § 422.7.[12] A multitude of other states has similar enhancement provisions.[13] Many of these states, in addition to still other states, also statutorily punish hate crimes independent of the commission of any other crime.[14]

The Supreme Court has long held that the First Amendment protects *expression* and not conduct. *See Spence v. Washington*, 418 U.S. 405, 409 (1974). By its very terms, the First Amendment shelters simply speech: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Admittedly, courts have extended First Amendment protection to conduct when that conduct is imbued with a certain degree of expressive quality. Thus, the Supreme Court has struck down government regulations when they overreachingly restrict an individual's ability to communicate through conduct. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning); and *O'Brien*, 391

[12] Because the right to personal security is one that is recognized under both federal and state law, freedom from assault, battery or other violent acts is clearly one of the "rights" protected by section 422.7. *See United States v. Messerlian*, 832 F.2d 778, 790 n.20 (3d Cir. 1987), *cert. denied*, 485 U.S. 988 (1988); *California v. Lashley*, 1 Cal. App. 4th 938, 950 nn.8-9 (1991); Cal. Civ. Code § 51.7.

[13] *See* Appendix at A-1.

[14] For example, in California, Penal Code section 422.6 provides:

(a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, disability, or sexual orientation.

* * * *

(c) Any person convicted of violating subdivision (a) . . . shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars ($5,000), or by both that imprisonment and fine. However, no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

See Appendix at A-1 for other states which similarly punish hate crimes independent of the commission of any additional crime.

U.S. 367 (draft card burning). In effect, the recent decision of the Supreme Court in *R.A.V.* is the latest chapter in this chronicle of protected expressive conduct, holding that cross burning, like flag and draft card burning, is in some circumstances conduct sufficiently imbued with expressive qualities for First Amendment protection.

However, when a governmental regulation targets conduct and only peripherally impacts expression, courts are loathe to extend First Amendment protection. This reluctance was perhaps most clearly enunciated in *Arcara v. Cloud Books*, 478 U.S. 697 (1985). In *Arcara* this Court addressed a state's closure of an adult bookstore out of which prostitutes operated. Petitioner, the owner of the bookstore, challenged the application of the state's prohibition of prostitution, arguing that it impeded his First Amendment rights by impermissibly burdening his bookselling activities. This Court disagreed, finding that the conduct targeted by the statute—prostitution—was not protected expression. *Arcara*, 478 U.S. at 705.

The Court found that the extent to which the regulation impeded the bookseller's freedom of expression was no different than that inherent in *any* criminal or civil sanction. The Court wrote:

> [W]e have not traditionally subjected every criminal and civil sanction . . . to [First Amendment] scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity . . . .

Id. at 706-07. Because the regulation at issue in *Arcara* involved neither of the situations where First Amendment scrutiny is proper, the Court concluded "the First Amendment is not implicated." *Id.* at 707.

The distinction between regulations affecting expressive conduct and regulations directed at conduct and only peripherally affecting expression was noted again by this Court in *R.A.V.* The statute at issue in *R.A.V.* provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but

> not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender, commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 112 S. Ct. at 2541. Because the statute prohibited *expressive* conduct based on its *content*, the Court found it offended First Amendment principles. "The government may not regulate [conduct] based on hostility—or favoritism—towards the underlying message expressed." *Id.* at 2545. However, the Court expressly rejected attempts, such as Respondent Mitchell's, to cloak non-expressive conduct with First Amendment protection:

> Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination . . . *where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulations merely because they express a discriminatory idea or philosophy.*

Id. at 2546 (emphasis added). The Court *did not* find the statute in *R.A.V.* violated the First Amendment because it prohibited discrimination. The above quotation clearly shows that the Court recognized that acts of discrimination are not protected expression.[15] Rather, the Court found that the statute's *selection* of certain types of discriminatory *expression* violated the First Amendment.[16]

The above quotation also highlights two distinct differences between the statute at issue in *R.A.V.* and Wisconsin's section 939.645. First, the Wisconsin statute prohibits *conduct*, specifically the commission of a crime inflicted in a discriminatory or

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[15] Thus, the *Mitchell* court is somewhat disingenuous when it states that "[t]he ideological content of the thought targeted by the [Wisconsin] hate crimes statutes is identical to that targeted by the St. Paul ordinance—racial or other discriminating animus." 485 N.W.2d at 815.

[16] It is important to note that the defendant in *R.A.V.* was convicted pursuant to several statutes, but challenged only the "fighting words" conviction. The defendant in *R.A.V.* did *not* challenge his conviction under the Minnesota statute punishing racially motivated assaults, Minnesota Statute section 609.2231(4)(West 1992). *R.A.V.*, 112 S. Ct. at 2541 n.2.

bias-motivated fashion. It does not prohibit speech, or expressive conduct such as cross-burning, in any way. Second, section 939.645 is content-neutral. It does not selectively regulate conduct which expresses certain disfavored topics as did the *R.A.V.* statute.

For these reasons, *R.A.V.* is simply inapplicable to *Mitchell*. Indeed, application of *R.A.V.* to this case would run headlong into this Court's express qualification in *R.A.V.* that individuals who discriminate cannot justify their activity with the First Amendment merely because their discrimination includes a discriminatory idea or philosophy. Citing to and upholding federal statutes which prohibit discrimination, this Court rightfully rejected any such attempt to bootstrap an illegal activity such as discrimination into the First Amendment's sphere of protected activity.[17]

Recently, the Oregon Supreme Court came to the same conclusion addressing that state's hate crime laws. *Oregon v. Plowman*, 838 P.2d 558 (Or. 1992). At issue in *Plowman* was a statute similar to section 939.645 which criminalized "intentionally, knowingly or recklessly [causing] physical injury to another because of [the] perception of that person's race, color, religion, national origin or sexual orientation." *Id.* at 560 (quoting Oregon Revised Statute ("O.R.S.") 166.165(1)(a)(A) (Butterworth 1990)).[18] The defendant in *Plowman* argued, *inter alia*, that his

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[17] The distinction between protected expression and unprotected conduct was noted by John Stuart Mill:

> Such being the reasons which make it imperative that human beings should be free to form opinions and to express their opinions without reserve . . . . No one pretends [however] that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute . . . a positive instigation to some mischievous act. . . . Acts, of whatever kind, which without justifiable cause do harm to others, may be, and in more important cases absolutely require to be, controlled . . . .

John Stuart Mill, *On Liberty*, at 53 (Hackett Publishing Co. 1978) (1859).

[18] While O.R.S. 166.165(1)(a)(A) "creates and defines the crime of intimidation in the first degree," *Plowman*, 838 P.2d at 559-60, the defendant challenged it as a statutory enhancement. *Id.* at 562. The reasoning behind the challenge apparently rested on the fact that intimidation in the first degree is a Class C felony, while assault in the

conviction under the statute contravened his First Amendment rights to free speech "because a violation of [the statute] 'must necessarily be proved by the content of his speech.' " *Id.* at 564.

The Oregon Supreme Court rejected this argument, holding that the First Amendment right to free speech was not even implicated by the statute because the statute regulates only *conduct*. The court refused the defendant's attempt to analogize to *R.A.V.*, holding:

> The [*R.A.V.*] Court distinguished laws, such as the St. Paul ordinance, that are directed against the substance of speech from laws that are directed against conduct . . . .
>
> [The Oregon Statute] is a law directed against conduct, not a law directed against the substance of speech. In *R.A.V.*, the Court expressly did not rule on the constitutionality under the First Amendment of a statute like the one that we consider here.

Id. at 565.

The Oregon court flatly rejected the defendant's argument that O.R.S. 166.165 proscribes communication because " 'it must necessarily be proved by the content of his speech or associations.' " *Id.* at 565. Paralleling this Court's analysis in *Arcara*, the *Plowman* court found speech was not necessarily implicated by the regulation; there was a multitude of evidentiary showings not involving speech that would establish the intent to discriminate. *Id.* Further, the *Plowman* court established that any burden on speech created by the fact that speech *might* be used to prove a violation of O.R.S. 166.165 was *de minimis* and no greater than the burden on speech presented by other crimes, such as attempted murder (where a defendant's intent, for example, might be proven by evidence of his spoken or written statements). *Id.*[19]

This Court should find the Oregon court's analysis persuasive. The *Plowman* court's interpretation of the First Amendment is without a doubt more consistent with this Court's First Amendment jurisprudence than the *Mitchell* court's obfuscation of established First Amendment principles. The First Amendment cannot be interpreted, as it is by the *Mitchell* court, as an instrument by which hateful acts of discrimination are elevated into the realm of protected expression. The First Amendment surely was never

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fourth degree—the basis of defendant's other conviction—is a Class A misdemeanor. *Id.* Thus, application of O.R.S. 166.165(1)(a)(A) acted as a *de facto* enhancement of the punishment the defendant would otherwise have received.

Respondent may argue that O.R.S. 166.165 is distinguishable from the Wisconsin statute because it requires "two or more persons acting together." *Id.* at 560. However, this is a distinction largely without a difference. Indeed, to the extent the Oregon statute differs from Wisconsin's due to its group action requirement, the difference would, if anything, require a more rigorous First Amendment scrutiny of the Oregon statute because it implicates associational as well as speech rights.

[19] An intermediate Florida court reached a similar conclusion in *Dobbins v. Florida*, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992), *jurisdiction accepted*, No. 80,500 (Fla. Dec. 23, 1992). *Dobbins* involved a Jewish boy who attempted to join a "Skinheads" association. When members of the association discovered that the boy was Jewish, a group led by the defendant Dobbins severely battered the boy. Dobbins was convicted under Florida's battery statute and sentenced pursuant to the enhancement provisions of Florida's hate crimes statute, Florida Statute section 775.085 (West 1992). Section 775.085 provides:

> The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim.

Fla. Stat. § 775.085.

The Florida court rejected Dobbins' argument that the statute improperly punished his opinion in contravention of the First Amendment. The court wrote:

> We agree that the First Amendment prohibits intrusion into the rights of one to freely hold and express unpopular, even intolerant, opinions.
>
> But section 775.085 does not punish intolerant opinions. Nor does it punish the oral or written expression of those opinions. *It is only when one acts on such opinion to the injury of another that the statute permits enhancement.*

Id. at 923-24 (emphasis added). The court further rejected Dobbins' arguments that *R.A.V.* mandated application of the First Amendment to section 775.085 and that *R.A.V.* blessed the activity that section 775.085 punished. The court held that section 775.085 fell squarely within the type of regulation that *R.A.V.* excepted from First Amendment scrutiny because it " 'does not target conduct on the basis of its expressive content' " and because " 'acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.' " *Id.*

intended to support such conduct. While the *R.A.V.* decision does represent the most recent chapter in the Supreme Court's treatment of expressive conduct, it by no means blesses any and all conduct arguably containing a message. Indeed, the *R.A.V.* Court itself expressly refused the extension made by the Wisconsin Supreme Court whereby acts of discrimination become protected expression.

B. IF ANY FIRST AMENDMENT SCRUTINY IS WARRANTED, IT IS THE DEFERENTIAL *O'BRIEN* TEST AND THE WISCONSIN STATUTE IS VALID UNDER *O'BRIEN*.

Even assuming that the activity proscribed by section 939.645 has enough expressive qualities to warrant First Amendment scrutiny, the statute survives such scrutiny. As a regulation primarily of conduct that only secondarily impacts expressive activity, section 939.645 is valid if it meets the test set forth by this Court in *O'Brien*, 391 U.S. 367. The *O'Brien* test validates such a regulation if: (1) it is within the constitutional power of the state; (2) it furthers an important government interest; (3) that interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that governmental interest. *Id.* at 377.

1. It Is Manifestly Within the Power of the States to Proscribe Hate Violence.

The power of a state to criminalize violent behavior is clear. State and federal legislatures have the power to pass laws that are reasonably necessary to promote the public health, safety and morals, and "[t]here is no question that the proscription of force or [the] threat of force is within the government's powers." *United States v. Gilbert*, 813 F.2d 1523, 1531 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987). Further, the power of the State to prohibit discrimination is also beyond argument. *See, e.g.*, 42 U.S.C. §§ 2000e, *et seq.*; 42 U.S.C. §§ 3601, *et seq.*; Cal. Gov't Code §§ 12900-966 (West 1992).

Thus, section 939.645, which punishes violence against another (among other crimes) inflicted in a discriminatory or bias-motivated fashion, is clearly a valid exercise of Wisconsin's constitutional power to legislate for the public welfare.

2. Hate Crimes Statutes Further States' Interests in Eliminating Hate Violence and Preventing the Spiraling Violence that it Engenders Throughout the Community.

The states have an obviously important interest in preventing hate violence.[20] Hate crimes have a particularly pernicious effect on both their victims and the community at large.

Indeed, the hatred, bias and bigotry which motivate perpetrators to commit hate crimes distinguish such crimes from other assaults, threats of violence, or acts of vandalism. Studies indicate that hate crimes more often involve physical assault than conventional crimes. For example, the Department of Justice has found that approximately 10% of reported conventional crimes are personal assaults, while the remaining 90% are directed at property. *Report to the Nation on Crime and Justice*, U.S. Department of Justice, at 12 (2d ed. 1988). Statistics reported from several police departments, however, indicate that more than 30% of hate crimes are personal assaults. B. Levin, *A Practical Approach to Bias Crimes for Police* (1992); *see also Hate Crime In Massachusetts—Preliminary Annual Report—January-December 1990*, Executive Office of Public Safety Criminal History Systems Board, Crime Reporting Unit, at 3 (Jan. 24, 1991). Similarly, the National Institute Against Prejudice and Violence reported that physical assault was the most common form of hate crime, accounting for 24.8% of hate crimes reported in its sample. *The Ethnoviolence Project-Pilot Study, supra*, at 5.

There is also evidence that the injuries caused by hate crimes are more severe than those caused by other crimes. A study conducted by Professor Jack McDevitt interpreting the Boston Police Department's bias crime statistics found that 74% of bias-motivated assaults resulted in physical injury, with 30% of those injuries requiring hospital treatment. *The Study of the Character of Civil Rights Crimes in Massachusetts, supra.* Professor McDevitt's report contrasts these figures with statistics indicating

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[20] With regard to the State's interest in "[ensuring] the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish," the Supreme Court in *R.A.V.* concluded: "We do not doubt that these interests are compelling." *R.A.V.*, 112 S. Ct. at 2549.

that only 29% of non-biased assaults nationally reported resulted in injury, with only 7% of those requiring hospitalization. *Id.*

In addition to the intensified violence and severity of injury which distinguish hate crimes from non bias-motivated offenses, studies show that hate crimes are distinctive in other respects. For example, the National Institute Against Prejudice & Violence reported that hate crimes most often occur as serial incidents ranging in a period of over several months to several years. *The Ethnoviolence Project-Pilot Study, supra,* at 5. This report found that 65% of victims reporting hate crimes experience numerous related attacks, while only 17.5% of hate crimes victims reported isolated incidents. *Id.* Other studies based on police department statistics indicate that hate crimes victims are more likely to be attacked by a group of offenders than by a single attacker. These studies also show that crimes motivated by bias are more often committed by strangers than non-bias crimes, and further that these crimes are often committed by informal groupings of strangers. *A Practical Approach to Bias Crimes for Police, supra.*

The insidious effects of hate crimes on the individual victim go well beyond physical injury, loss of property, and resulting financial loss. As was noted in a recent study:

- Many victims fear for their safety and for their family's safety. Most of them report changes in their lifestyle—where they walk, how they answer the phone, reactions to strangers, and suspicion of co-workers. Fear can take on paranoid qualities and intensely disrupt the lives of some victims.

- Another common response is anger. Several persons seemed almost surprised by the depth and power of the anger which the incident evoked in themselves. Some made reference to plans or fantasies of retaliation should the incidents be repeated.

- Another response pattern throughout the interviews concerns the children of the victims. Many parents, concerned about the safety of their children, will not let their children go outside to play.

- Conversely, many parents are concerned about the psychological effects of such isolation. One woman, worried about her children developing hatred for whites, tries to suppress her responses in front of the children.

The Ethnoviolence Project-Pilot Study, supra, at 7-9; *see also,* J. Weiss, H. Ehrlich, and B.E.K. Larcom, *Ethnoviolence at Work,* Journal of Intergroup Relations, National Institute Against Prejudice & Violence, Report No. 6, at 27-30 (Winter 1991-92).

Unfortunately, the victimization does not stop there. Hate crimes cause parallel psycho-physiological and behavioral effects in a victim's community as well. "For the co-victim, attacks on their peers are seen as danger signals to the entire group, as well as potential threats to their personal wellbeing." *Campus Ethnoviolence,* National Institute Against Prejudice & Violence, Report No. 5, at 11 (1992). "Unlike opportunistic crimes, these attacks are motivated less by a desire to rip people off than to rip them apart—psychically, if not always physically. . . . These attacks are intended to violate and isolate not just the victim, but the entire group." B. Levin, *Background Report on Hate Crimes, California.,* Stanford Law School, at 22-23 (Apr. 1991) (citation omitted).

Furthermore, the fact that hate crimes profoundly effect and terrorize not only immediate victims but also the community with which the victim is associated, is clearly indicated by the upward spiral in hate crime violence which often follows an initial incident. "Because the real targets are specified groups, rather than just individuals, there is significant potential for the spiral of violence to increase." B. Levin, *Hate Crimes Seminar Module For Patrol Officers,* at 12-13 (1992). An example of the spiraling violence is the events in New York City following the Howard Beach homicide in late December 1986. The number of hate crimes reported in New York City rose from a total of 20 incidents in December 1986, to approximately 75 incidents in January 1987. *New York State Governor's Task Force on Bias Related Violence—Final Report* (Mar. 1988). Similarly, the reaction to the verdict following the Rodney King beating resulted in 60 deaths, 2500 injuries and 750 incidents of arson in the Los Angeles area. *Anti-Defamation League Special Report: The Los Angeles Riot—Extremist Exploitation,* at 1 (1992).[21]

Recent studies in California indicate that hate crimes occur every day and are at "an all-time high." *Freedom From Fear—Ending California's Hate Violence Epidemic,* Final Report of the

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[21] An even more compelling example rests in the *Mitchell* case itself where a *fictional* incident of hate crime in "Mississippi Burning" spawned a retaliation by the victimized group.

Lieutenant Governor's Commission on the Prevention of Hate Violence (May 1992), App. at A-2. The Lieutenant Governor's Report provides an alarming amalgam of hate crimes statistics from 1991, including:

** The Anti-Defamation League of B'nai B'rith ("ADL") reported a 34 percent rise in attacks and threats against Jews in California.

** The Los Angeles County Gay and Lesbian Community Services Center reported a 50 percent increase in the number of attacks on gay and lesbian people reported to them.

** The National Gay and Lesbian Task Force saw a 31 percent increase in gay-bashing attacks in five major U.S. cities, with 473—an 11 percent increase—reported in San Francisco by Community United Against Violence.

** In the best comprehensive data available on hate violence in California, the Los Angeles County Human Relations Commission reported 672 incidents of hate violence in the Los Angeles County region, a 22 percent increase from 1990. These included 147 incidents directed at gay men and 20 at lesbians, 130 at African Americans, 130 at Jewish people, 67 at Latinos, 54 at Asian Americans, and 22 at Arab Americans.

** A marked increase in physical assaults over other methods of hate violence. For the first time, physical assaults outnumbered all other incidents of hate violence reported to the Commission, making up almost 37 percent of the total.

** With regard to other common targets, African Americans, Jewish Americans and immigrants of all backgrounds have long been targets of hate violence and continue to be the favored targets. Latinos have also been a major target, particularly here in California with its large and growing Latino population. Asian Americans have suffered increased levels of violence directed at them as economic competition with countries like Japan, Korea and Taiwan has generated societal tensions. Arab Americans were victimized by numerous attacks, threats and vandalism before, during, and after the Persian Gulf War of 1991.

Id. App. at A-2-A-3. Based on these facts, the Lieutenant Governor concluded: "We characterize these trends, we think not overdramatically, as an epidemic of hate violence." *Id.*

Clearly, states have an important interest in ending the "epidemic" of hate violence and protecting their citizens from the tragic effects of hate crimes. Numerous other courts, both federal and state, have agreed. *See, e.g., Gilbert,* 813 F.2d 1523; *United States v. Bledsoe,* 728 F.2d 1094 (8th Cir.), *cert. denied,* 469 U.S. 838 (1984); *New York v. Grupe,* 532 N.Y.S.2d 815, 818 (N.Y. Crim. Ct. 1988); and *Oregon v. Beebe,* 680 P.2d 11, 13 (Or. Ct. App. 1984).

3. The Interest Promoted by Statutes Like Wisconsin's Section 939.645 Is Unrelated to the Suppression of Expression.

The third prong of the *O'Brien* test focuses on the purpose of the statute at issue. If that statute's purpose, or the "interest promoted by the statute," is unrelated to the suppression of expression, then the law passes muster under the third prong.

As is stated *supra*, the purpose of statutes like section 939.645 is to address the phenomenon of hate crimes, the incidence of which the Lieutenant Governor has concluded in California is "epidemic." Nowhere in the Wisconsin statute or its legislative history is there any indication that the State's aim is to suppress expression.[22]

Despite this evidence to the contrary, Respondent may still argue that an *additional* purpose for the statute is restricting expression and that the two purposes are intertwined. This Court's treatment of such an argument in *Barnes v. Glen Theatre, Inc.,* ___ U.S. ___, 111 S. Ct. 2456 (1991) is instructive. In *Barnes*, the Court upheld Indiana's anti-nudity statute as applied to nude dancing. The Supreme Court conceded that public nudity can at times be expressive and that nude dancing is such expression. Nonetheless, in determining that the statute was unrelated to the suppression of expression, the Court found that "while the dancing to which [the statute] was applied had a communicative element, it was not the dancing that was prohibited, but simply its

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[22] Indeed, California Penal Code section 422.7's companion statute, section 422.6 (which criminalizes the same discriminatory conduct that is the subject of section 422.7) states that the statute does not apply "based upon speech alone." Cal. Penal Code § 422.6(c).

being done in the nude." *Id.* at 2463. The Court also noted that the same erotic message could be, and was, expressed in the same strip clubs by dancers wearing minimal clothing—that is, there were alternative means of expressing the same message without the prohibited conduct. *Id.*[23]

Applying the *Barnes* analysis to section 939.645, it is clear that section 939.645 is as unrelated to the suppression of expression as is the statute in that case. Section 939.645 does not prohibit discriminatory animus, or its expression, but only the manifestation of that hatred in an act, for example an assault or battery. To paraphrase the Court in *Barnes*, it is not the expression of hatred that is prohibited, but simply its manifestation as violence.[24]

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[23] A decision rendered by an Oregon appellate court addressing the same statute at issue in *Plowman* is also instructive. *Oregon v. Hendrix*, 813 P.2d 1115 (Or. Ct. App. 1991), *aff'd*, 314 Or. 170 (1992), *petition for cert. filed* (Oct. 26, 1992). *Hendrix* involved the case of a co-defendant to the defendant in *Plowman* who also challenged Oregon's intimidation statute on First Amendment grounds. As the Oregon Supreme Court held in *Plowman*, the *Hendrix* court found that the First Amendment was not even implicated by the statute because the statute regulated conduct, not speech. The *Hendrix* court based its holding on the following findings:

> No person is subject to punishment under the Intimidation Law merely for holding or expressing opinions that are inimical to others because of their race, color, religion, national origin or sexual orientation. The focus of the statute is to forbid a result: physical injury.... Although some conduct, such as flag burning during a political demonstration, is "expressive" and, therefore, protected by the First Amendment, we are aware of no case ... that holds that the act of inflicting physical injury on another, however motivated, is constitutionally protected expression. If fighting words are not worthy of First Amendment protection, the fight itself must be equally unworthy.

Hendrix, 813 P.2d at 1119 (citation omitted).

[24] And to paraphrase the court in *Hendrix*, *supra* note 23, the result punished by the statute is not speech, but rather violent crime inflicted in a discriminatory manner.

4. The Incidental Restrictions on Free Expression Caused by Section 939.645—If There Are Any—Are No Greater than Are Essential for Eliminating Discriminatory Violence.

As a threshold matter, it is simply unclear what expression is restricted, even incidentally, by Wisconsin's section 939.645. As an enhancement statute, section 939.645 operates only when another, independent crime has been committed. Persons wishing to espouse their hatred are not prohibited from doing so in any number of ways—they can still hold rallies, make speeches, form protests, and distribute leaflets—they just cannot do so in a manner that is prohibited by other provisions of Wisconsin's statutes.

The only plausible First Amendment argument that the Respondent might make is that the statute chills expression because evidence of speech *might* be admissible at trial to show motive. Thus, for example, individuals are restricted in expressing views that are racist, sexist, etc., due to their fear that in a later criminal conviction evidence of the speech will be used against them. This argument has many flaws, not the least of which is the fact that it is extremely implausible.[25] Further, as was noted by the Oregon

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[25] The *Mitchell* court relies heavily for this proposition, as it does throughout its opinion, on an article by Professor Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333 (1991).

With respect to the chill argument, Professor Gellman writes:

> It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs *before* any offense is committed and even if no offense is ever committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses.

Id. at 361 (emphasis in original) (*cited in Mitchell*, 485 N.W.2d at 316). Professor Gellman and, by incorporation, the *Mitchell* court, ignore two critical facts. First, as a practical matter, for any chill to inhere in a hate crimes statutes, the chilled individual *must* contemplate the eventual commission of the hate crime. All of the cases upon which Professor Gellman relies for her chill argument are cases in which certain forms of *speech* were expansively regulated, thereby chilling other forms of speech. *See Gooding v. Wilson*, 405 U.S. 518 (1972); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974). None of the cases

Supreme Court in *Plowman*, evidence of speech is already admissible at trials for innumerable intent-based crimes, such as any of the crimes of attempt, to prove motive and intent. *Plowman*, 838 P.2d at 564. The California Supreme Court has noted in *California v. Davis*, 68 Cal. 2d 481, 486 (1968), sustaining the constitutionality of California's incitement to riot act, "illegal conduct is not protected merely because it is in part initiated, evidenced, or carried out by language."

Even assuming, however, that section 939.645 might incidentally "impact" expression, it does so no more than is essential to further the governmental interest in ending hate violence. In *Barnes*, the Supreme Court noted that the antinudity statute at issue there was almost by definition narrowly tailored: "[T]he statutory prohibition is not a means to some greater end, but an end in itself." *Barnes*, 111 S. Ct. at 2463. In other words, the most direct way to prohibit public nudity is to prohibit public nudity. Enhancement statutes like Wisconsin's section 939.645 are no different—their purpose is to prevent discrimination and they do so in the most direct manner possible by punishing the act of discrimination itself. No other means could serve this end.

Thus, under the four prong *O'Brien* test, section 939.645 does not violate the First Amendment.

C. IF THIS COURT ADOPTS THE *MITCHELL* COURT'S ANALYSIS, EVERY LAW PROHIBITING DISCRIMINATION IS RENDERED SUSPECT TO FIRST AMENDMENT ATTACK.

Rather than follow either the *Arcara* or *O'Brien* analyses, the *Mitchell* court, analogizing to the statute in *R.A.V.*, found section 939.645 to be an impermissible "content-based" restriction of Mitchell's First Amendment rights. The *Mitchell* court based its ruling on two findings. First, the court held that section 939.645 directly violates the First Amendment because it punished the defendant solely on the basis of his thoughts. In order to prove discriminatory motive, the court reasoned, the statute required evidence of the defendant's reasons for selecting the victim. The

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dealt with a state's regulation of crime where punishment *might* be based upon speech by the perpetrator, thereby, in Professor Gellman's words, "chilling" the perpetrator's commission of that crime. Second, even in instances of such a chill, the effect is no different from that of a multitude of crimes—such as the crimes of attempt, *see infra*—an effect which every jurisdiction in the country has deemed acceptable.

court held that this requirement amounted to punishing the defendant for his thoughts, and "[p]unishment of one's thought, however repugnant the thought, is unconstitutional." *Id.* at 814. Discriminatory motive, the court concluded, can never be an element of a crime. *Id.*

Second, the *Mitchell* court held that the statute was fatally overbroad, and thus indirectly violated the First Amendment by chilling protected speech. 485 N.W.2d at 815-17. The court explained that producing evidence of the defendant's speech in order to prove motive would make people fearful of expressing discriminatory views lest that expression subsequently be entered as evidence against them. *Id.* at 815-16.

The *Mitchell* court's first mistake is its holding that discriminatory motive can never be an element of a crime without violating the First Amendment. Such a rule has no foundation in the law. Indeed, there are a number of federal and state criminal laws which proscribe bias-motivated conduct.[26] Further, the decisions of numerous state and federal courts support the notion that discriminatory motive can be and frequently is an element of criminal statutes.[27] Both federal and state statutes and case law

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[26] *See, e.g.*, 18 U.S.C. § 245; 42 U.S.C. § 3631. *See also* Appendix at A-1 (setting forth states with hate crimes laws comparable to section 939.645).

[27] *United States v. Ebens*, 800 F.2d 1422, 1429 (6th Cir. 1986) (overturning defendant's conviction under 18 U.S.C. § 245, but noting that: "It was altogether proper for the jury to consider this evidence [of verbal harassment] and the comments made by [the defendant] as bearing upon his specific intent."); *Bledsoe*, 728 F.2d 1094 (upholding a conviction under 18 U.S.C. § 245, noting that there was sufficient evidence to conclude that the attack was motivated by the victim's race); *United States v. Franklin*, 704 F.2d 1183, 1188 (10th Cir.), *cert. denied*, 464 U.S. 845 (1983); *Kinser v. Maryland*, 591 A.2d 894 (Md. Ct. Spec. App. 1991) (upholding a conviction under Maryland's racial assault statute where evidence of racial motive was shown by defendant's statement: "[Y]ou better lock me up now or I'll take care of the nigger myself."); *Grimm v. Churchill*, 932 F.2d 674 (7th Cir. 1991) (finding probable cause for arrest under Illinois' hate crimes statute when defendant uttered racial slurs, had history of making racial confrontations, and arrest occurred at site of previous racial confrontations); *Commonwealth v. Rink*, 574 A.2d 1078 (Pa. Super. Ct. 1990) (defendant's urging crowd of teenagers to "Kill the nigger; get him," sufficient without showing of further activity to complete offense of ethnic intimidation); *Commonwealth v. Stephens*, 515 N.E.2d 606

thus stand in contravention of the *Mitchell* court: discriminatory motive can be, and frequently is, an element of a crime without violating the First Amendment.

For example, in *Gilbert*, 813 F.2d 1523, the Ninth Circuit upheld 42 U.S.C. § 3631 (the Fair Housing Act), against both First Amendment and Due Process challenges. The defendant in *Gilbert* contended that he was indicted under the law by reason of expression alone and that his First Amendment rights were therefore violated. The court held that while application of the statute does turn on the defendant's discriminatory motive as manifested by expression, the statutory requirement of an intent to intimidate prevented the statute from being applied to protected speech. *Id.* at 1529. In other words, the requirement of an underlying criminal intent or act (such as an intent to intimidate or to assault) prevents the law from unconstitutional application.

The Wisconsin Supreme Court's finding that there can be no punishment for discriminatory motive has another effect. If taken to its logical conclusion, the reasoning would invalidate nearly every federal and state antidiscrimination law now in effect. For example, 18 U.S.C. § 245 imposes criminal sanctions where any person "by force or threat of force willfully injures, intimidates or interferes with" federally protected rights where such injury or intimidation or interference is motivated because of the race, color, religion or national origin of the victim. 18 U.S.C. § 245(b). Any person found in violation of this section faces a fine of up to $1,000 or imprisonment of up to ten years, or both. *Id.* And where death has resulted from the violation, imprisonment may be for any term of years or for life. *Id.*

(Mass. App. Ct. 1987) (violent attacks on Cambodian tenants because of their national origin deprived them of rights under federal and Massachusetts law); *Hendrix*, 813 P.2d 1115 (upholding constitutionality of Oregon racial intimidation statute against First Amendment challenge); *Grupe*, 532 N.Y.S.2d at 818 (upholding New York's hate crime statute because: "The statute does not attempt to prohibit bigotry itself. The individual's freedom to think, and indeed, speak, publish, or broadcast views on the subject of race, religion or ethnicity are not regulated by this law. Violent conduct is what is being regulated."); and *Beebe*, 680 P.2d 11 (upholding Oregon's racial intimidation statute against an equal protection challenge based on the notion that the different treatment of criminals who are convicted under the hate crimes statute denied victims of non-racial assaults equal protection of the laws).

Under *Mitchell*'s reasoning, section 245 should also be found unconstitutional. *Mitchell* holds that section 939.645 is unconstitutional because it "punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection." *Mitchell*, 485 N.W.2d at 812 (emphasis added). Under this reasoning section 245, which, like section 939.645 criminalizes discriminatory motive, also violates the First Amendment.

The *Mitchell* court's attempt to distinguish section 939.645 from other antidiscrimination laws ultimately sounds hollow, belying the lack of any such distinction. The court asserts that "[d]iscrimination and bigotry are not the same," and seeks to distinguish between the discriminatory act which is punished by antidiscrimination laws and the "selection," which the court deems to be a mental process protected by the First Amendment. *Id.* at 816. It repeatedly attempts to argue that antidiscrimination laws punish and seek to deter "objective acts" of discrimination whereas hate crimes laws punish not objective acts but rather subjective mental processes. *Id.* This reasoning neglects the critical fact that section 939.645 *cannot* operate unless and until a defendant *acts* (*i.e.* until a defendant violates another criminal statute discriminatorily).

Further, this Court's decision in *R.A.V.* clearly rejects the reasoning adopted by the *Mitchell* court and explicitly makes note of laws, such as Title VII and 18 U.S.C. §§ 241, 242, where the First Amendment is not violated even where words alone evidence a violation of the law. *R.A.V.*, 112 S. Ct. at 2546. While the *Mitchell* court clearly attempts to limit its reasoning to apply only to criminal statutes, the court's condemnation of section 939.645's "because of" language undoubtedly implicates all laws which protect certain classes of persons. Justice Bablitch states this concisely in his dissent in *Mitchell*: "Laws forbidding discrimination in the marketplace and laws forbidding discrimination in criminal activity have a common denominator: they are triggered when a person acts 'because of' the victim's protected status." *Mitchell*, 485 N.W.2d at 820 (Bablitch, diss.).

Civil rights laws since the Reconstruction Era have recognized the need to protect and enforce the rights of certain identifiable classes of persons *because of* their membership in those classes of persons. These laws make otherwise legal acts illegal when the motivating factor behind the acts is discrimination against an

individual or group of individuals because of their class membership.[28]

The *Mitchell* court's attempt to distinguish between antidiscrimination statutes like Title VII and the hate crimes statute it strikes down as unconstitutional is intellectually dishonest.[29] These statutes, like section 939.645, punish conduct that is motivated by a desire to discriminate. Just as a Title VII employer's discriminatory "thoughts" are not protected by the First Amendment, neither are a Wisconsin criminal's.

The *Mitchell* court also errs by finding that the Wisconsin statute is overbroad and thereby chills protected speech. Again, the *Gilbert* case is instructive. After noting that application of the overbreadth doctrine is "strong medicine" to be sparingly applied, especially as to statutes regulating conduct, the Ninth Circuit concluded in *Gilbert*,

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[28] Federal civil rights statutes have long made it illegal to discriminate against persons because of their membership within an identifiable class. For example:

Title VIII of the Civil Rights Act of 1968, the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, makes it unlawful for any person to discriminate "because of race, color, religion, sex or national origin" in the terms or conditions of the sale, rental, or financing of housing;

Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, guarantees that all persons be entitled to the full and equal enjoyment of public accommodations without discrimination or segregation "on the ground of race, color, religion, or national origin;"

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, makes it illegal for any person in the United States to be excluded from participation in or denied the benefits of a federal program or activity "on the ground of race, color, or national origin;"

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, makes it unlawful to discriminate in employment practices against a person "because of such individual's race, color, religion, sex or national origin."

[29] As Justice Bablitch asks in his dissent:

> How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity?

Mitchell, 485 N.W.2d at 820.

> Section 3631 on its face regulates conduct, although expressive speech may also be implicated. The possibility of the statute's reach into substantial, impermissive [sic], protected activity appears remote. When a statute may deter protected speech only to some unknown extent, we cannot justify invalidating the statute and thereby prohibiting the government from regulating conduct within its power to proscribe.

813 F.2d at 1531 (citations omitted). This language in *Gilbert* presages this Court's opinion in *R.A.V.* The Court in *R.A.V.* similarly refused to cloak discriminatory conduct with First Amendment protection simply because that conduct conveys an idea or philosophy. *R.A.V.*, 112 S. Ct. at 2546. The *Mitchell* court's overbreadth theory, as well as its reasoning which outlaws the future use of motive, has no merit.

This Court should reject the Wisconsin Supreme Court's application of *R.A.V.* to an act of pure discrimination. The *R.A.V.* decision expressly prohibits its application to a case such as Respondent's. *Mitchell* provides, if anything, a telling example of the anomalous and insupportable results that will follow a court's misapplication of *R.A.V.* to enhancement statutes such as Wisconsin's section 939.645.

V

CONCLUSION

For the foregoing reasons, the Court should reject the *Mitchell* court's application of the First Amendment to section 939.645. Section 939.645 does not implicate, let alone violate, the rights accorded individuals under the First Amendment. To find otherwise ignores and indeed rejects the clear import of a multitude of state and federal laws prohibiting discrimination. Therefore, the Wisconsin Supreme Court must be reversed.

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Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

JURISDICTIONS WITH HATE CRIMES STATUTES SIMILAR TO SECTION 939.645

The following jurisdictions have enacted enhancement statutes similar to Wisconsin's:

California (Cal. Penal Code §§ 190.2, 422.7, 422.75 (West 1992)); Florida (Fla. Stat. Ann. § 775.085 (West 1992)); Maryland (Md. Ann. Code art. 27, § 470A (Michie 1992)); Minnesota (Minn. Stat. Ann. § 609.2231 (4) (West 1992)); Montana (Mont. Code Ann. § 45-5-222 (1991)); New Hampshire (N.H. Rev. Stat. Ann. § 651:6 (1991)); New Jersey (N.J. Stat. Ann. § 2C:44-3 (West 1992)); Utah (Utah Code Ann. § 76-3-203.3 (Michie 1992)); Vermont (Vt. Stat. Ann. tit. 13, § 1455 (1991)).

The following jurisdictions have criminalized acts of hate violence as an independent crime:

California (Cal. Penal Code § 422.6 (West 1992)); Colorado (Colo. Rev. Stat. Ann. § 18-9-121 (West 1992)); Connecticut (Conn. Gen. Stat. Ann § 53a-181(b) (West 1992)); District of Columbia (D.C. Code Ann. §§ 22-4001-4004 (1992)); Idaho (Idaho Code § 18-7902 (1992)); Illinois (Ill. Ann. Stat. ch. 38, para. 12-7.1 (Smith-Hurd 1992)); Iowa (Iowa Code Ann. § 729.5 (West 1992)); Massachusetts (Mass. Gen. Laws Ann. ch. 265, §§ 37, 39 (West 1992)); Michigan (Mich. Comp. Laws Ann. § 750-147b (West 1992)); Missouri (Mo. Ann. Stat. §§ 574.090, .093 (Vernon 1992)); Nevada (Nev. Rev. Stat. Ann. § 207.185 (Michie 1991)); New York (N.Y. Penal Law § 240.30-.31 (McKinney 1984)); North Carolina (N.C. Gen. Stat. § 14-401.14 (1992)); North Dakota (N.D. Cent. Code § 12.1-14-04 (1991)); Ohio (Ohio Rev. Code Ann. § 2927.12 (Anderson 1992)); Oklahoma (Okla. Stat. Ann. tit. 21, § 850(A) (West 1993)); Oregon (Or. Rev. Stat. Ann. §§ 166.165 (Butterworth 1990)); Pennsylvania (18 Pa. Cons. Stat. Ann. § 2710 (Purdon 1983)); Rhode Island (R.I. Gen. Laws § 11.42-3 (Michie 1981)); Washington (Wash. Rev. Code Ann. § 9A.36.080 (West 1988)); West Virginia (W. Va. Code § 61-6-21 (Michie 1992)).

Excerpts from *Freedom From Fear—Ending California's Hate Violence Epidemic*, Final Report of the Lieutenant Governor's Commission on the Prevention of Hate Violence (May 1992).

INTRODUCTION: HATE VIOLENCE IN CALIFORNIA

In examining the issue of hate violence in California, the Commission on the Prevention of Hate violence has considered the definition of hate violence to be that established by the April 1986 report of the Attorney General's Commission on Racial, Ethnic, Religious and Minority violence:

> ". . . any act of intimidation, physical harassment, physical force or threat of physical force directed against any person, or family, or their properly or advocate, motivated either in whole or in part by hostility to their real or perceived race, ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of causing fear or intimidation, or to deter the free exercise or enjoyment of any rights or privileges secured by the Constitution or the laws of the United States or the State of California whether or not performed under color of law."

At its most fundamental level, hate violence is an aggressive expression of hatred against another person or group of people simply because of who and what they are. But an act does not have to be criminal to be an act of hate; the use of an epithet with the intent to cause fear is an expression of hate regardless of whether or not it is a crime. Thus, we have chosen to use the term "hate violence," encompassing both explicitly criminal acts and acts of hate which we also seek to prevent.

Our focus on this issue is a direct response to a perceived need. Hate crimes are at an all-time high in California; violent attacks on individuals because of their race, religion or sexual orientation are taking place every day.

The Anti-Defamation League of B'nai B'rith (ADL) reported a 34 percent rise in attacks and threats against Jews in California during 1991. The Los Angeles County Gay and Lesbian Community Services Center reported a 50 percent increase in the number of attacks on gay and lesbian people reported to them in the same

year. Also in 1991, the National Gay and Lesbian Task Force saw a 31 percent increase in gay-bashing attacks in five major U.S. cities, with 473—an 11 percent increase—reported in San Francisco by Community United Against violence.

In the best comprehensive data available on hate violence in California, the Los Angeles County Human Relations Commission reported 672 incidents of hate violence in the LA County region, a 22 percent increase over 1990. These included 147 incidents directed at gay men and 20 at lesbians, 130 at African Americans, 130 at Jewish targets, 67 at Latinos, 54 at Asian Americans, and 22 at Arab Americans.

This March 1992 report also noted a disturbing trend—a marked increase in physical assaults over other manifestations of hate violence. For the first time, physical assaults outnumbered all other incidents of hate violence reported to the Commission, making up almost 37 percent of the total.

Nowhere was the escalation of violence clearer than in the case of incidents directed at gay and lesbian targets. Physical assaults made up fully 69.2 percent of the sexual orientation incidents, and the number of physical assaults against lesbians and gay men (117) nearly matched the total of physical assaults against all other groups combined (130).

With regard to other common targets, African Americans, Jewish Americans and immigrants of all backgrounds have long been targets of hate violence and continue to be the favored targets of organized hate groups throughout the state and the nation. Latinos have also been a major target, particularly here in California with its large and growing Latino population. There is a widespread view supported by anecdotal evidence that violence directed against Latinos at or near the California-Mexico border has increased sharply in recent years.

Asian Americans have suffered increased levels of violence directed at them as the economic competition with countries like Japan, Korea and Taiwan has generated societal tensions. The 50th Anniversary of the attack of Pearl Harbor also generated threats and harassment of organizations like the Japanese American Citizens League. Arab Americans were victimized by numer-

ous attacks, threats and vandalism before, during and after the Persian Gulf War of 1991.

Each of these findings is supported both by existing studies of hate violence and by massive anecdotal evidence collected through law enforcement records, community groups and the news media.

We characterize these trends, we think not over-dramatically, as an epidemic of hate violence. For the past three years, reports of incidents have risen steadily and substantially. There is some credibility to the argument that some of this rise represents increased awareness and willingness to report incidents. But it is also clear that an upsurge of violence and hatred is occurring and having a daily impact on the lives of Californians throughout the state.

WHAT CAUSES HATE VIOLENCE?

The roots of hate violence are broad, but most causes come back to one element in the end: *fear*. This fear is most often rooted in ignorance: fear of the unknown, fear of the "other," fear of perceived competitors; all of these hold the potential to generate a violent reaction under the right conditions.

And those conditions are present in California today. The steadily increasing diversity of California's population, and the economic downturn and increased unemployment of the last two years has strongly influenced the increase in hate crimes during that same period. The fact that no single ethnic group will constitute a majority of California's population by the year 2000 has not gone unnoticed. With unemployment running around 8 percent during all of 1991, and surging as high as 8.7 percent in February 1992, the temptation to look for scapegoats has increased.

"US" AND "THEM": THE NATURE OF PREJUDICE

Prejudice is, at a basic level, instinctual. Many studies have been conducted to show that people habitually, instinctually are drawn to notice differences and similarities between themselves

and others. This is a natural function of our desire to create order out of the chaotic world around us.

But in comparing ourselves to others, we tend to label others' similar attributes to be desirable, and others' dissimilar attributes undesirable. Soon we are judging whether a person is "good" (that is, we react positively to them), or 'bad' (we react negatively). It is only a short jump for a stressed person from thinking "that person is bad because they are different from me" to "those people caused all my problems, and I'm going to do something about it." (This discussion of prejudice draws heavily on the work of Dr. Norman Miller of USC and Dr. Marilyn Brewer of UCLA, who have done a number of studies of prejudice, how it is formed and how it can be broken down. Dr. Miller was a presenter at the Commission's January 7, 1992, hearing.)

EXTERNAL INFLUENCES: HATE GROUPS, TRADITIONAL AND PSEUDO-MAINSTREAM

In terms of external causes, the efforts of groups such as the Ku Klux Klan, the White Aryan Resistance (WAR) and other neo-Nazi organizations to preach violence against racial, religious, sexual and other minorities continue unabated today. They have hate hotlines, computer bulletin boards, hate propaganda distribution networks, youth groups, street gangs, etc. active throughout the state, pumping out a steady drone of messages designed to transform the fears of the economically distressed, the paranoid and the ignorant into violent reaction. WAR, in particular, has been adept at indoctrinating and training gangs of young skinheads to brutalize minorities and vandalize their property.

These groups recognize very clearly the psychology of the issues they raise. As former WAR youth leader Greg Withrow told the Commission referring to his upbringing by his neo-Nazi father, "before I ever learned to hate, I learned to fear." They are indoctrinated to believe that minorities are a threat to their way of life, to their very existence, and that the only choice is to fight back in as violent a fashion as possible.

Yet, the efforts of these hardcore white supremacist groups ultimately reach only a few sympathetic ears on the fringes of American society.

What is more disturbing and potentially dangerous is the increasing proliferation of pseudo-mainstream hate groups like David Duke's National Association for the Advancement of White People. Duke and others of his ilk do everything possible to look, act and sound like standard interest groups simply promoting their views about society. But their messages are riddled with innuendo and code words designed to play on people's worst fears and prejudices in order to generate hatred against the people these groups perceive to be their enemies. For example:

—The homophobic preachings of some self-proclaimed watchdog groups like the Traditional Values Coalition spread an insidious message of hate. Their adoption of loaded terms to mask or even justify their virulent hatred of gay and lesbian people has made their views acceptable for some political leaders and small subgroups of the general population.

—Ethnically based groups like the National European American Society (NEAS) and the Irish Task Force purport to be simple ethnic pride organizations, but attack U.S. civil rights laws and immigration policies as "pure genocide" against European Americans. When provoked, they revert to true form and call people of similar ethnic backgrounds who disagree with their views "race traitors" and the like. Not all European-American groups are fronts for white supremacy; some are well-intentioned attempts to mimic other ethnically based clubs and groups. But the term "European American" has been tainted by its use by groups like the NEAS and the White Student Union, an offshoot of WAR.

These pseudo-mainstream hate groups are perhaps the most dangerous. A large percentage of the population automatically tunes out messages from known racist groups like the KKK, because they know who is talking to them and what their true agenda is. But groups with a mainstream cover, who use mainstream terminology and a healthy dose of charged code-words to spread their message, can find a much wider audience.

OTHER KEY EXTERNAL INFLUENCES

1. Peers

Most young people value the opinions of their peers highly. Many young people who have become involved and then left white supremacist groups say they joined because their friends were doing it or because they wanted to belong to a group—any group. The relative void of an American culture when compared to rich cultures like Mexican, Jewish and others may be a part of the psychology at work. Joining a racist gang - or any other gang - fulfills the need to belong. In the case of a racist gang, joining may additionally meet the desire to lash out at others who have a strong ethnic, cultural, religious or even sexual identity.

2. Family

Family may also exert a strong influence on attitudes regarding other people. Former WAR youth leader Greg Withrow told the Commission: "My father's expressed ideal for me was to lead a youth movement; to be as a Hitler . . . I was raised in Nazi camps, I was raised with this philosophy from childhood. I knew nothing else." Raised under these extreme circumstances, it is hard to imagine another outcome for Mr. Withrow than what occurred: heavy involvement with Aryan youth gangs and a career of several years as a WAR youth leader. While Mr. Withrow's experience represents an extreme, many young people in California and throughout the country are exposed to parental or other familial prejudices in the course of day-to-day living. These attitudes coming from important role models will inevitably affect how they view others.

A related issue is the new economic realities of the family. Kids today are the first generation in this century to know that they are unlikely to improve on the standard of living their parents enjoy. For many of them, this has darkened their outlook on life and nurtured a feeling of victimization which may in extreme cases demand some kind of retaliation.

3. Media

The mass media play a key role in shaping popular attitudes, especially among young people. The vast majority of young people today watch several hours of television per day, much of it unsupervised by parents. The portrayals, or lack of portrayals, of various types of people on the programs they watch inevitably shape their attitudes about those groups.

This is especially true in homogeneous neighborhoods where students may have virtually no firsthand exposure to people of a different background. In such case the only information a young person may have with which to form an opinion about a group of people is what they see on television, in the movies or in popular music. If stereotypes or negative portrayals of members of a group are all they see, they are likely to adopt negative preconceptions about members of that group.

4. Political Leaders

Some political figures today are willing to fan the flames of bigotry in order to advance their own interests and careers. We have seen rampant examples in recent years of political campaign ploys that are permeated with racist and homophobic connotations. The appearance that political figures and even some government leaders approve of these views gives them a veneer of respectability that they do not deserve. Young people who see leaders using these kinds of tactics and drawing a following may conclude that there is nothing wrong with race-baiting or gay-bashing.

CONCLUSION

Given the multiplicity of sources and the instinctual nature of prejudice, when addressing hate violence, we cannot afford to focus more than a small portion of our efforts on responding directly to specific sources of negative messages. We have to focus most of our efforts on the broader goal of inoculating the next generation so that they can reject those who try to infect them with hatred for others.

RESPONSES TO HATE VIOLENCE

INDEPENDENT/COMMUNITY-BASED RESPONSES-AWARENESS AND ACTIVISM

The documented increase in hate violence over the past ten years had been paralleled by—and sometimes, confused with—the growth in awareness of the problem. Increased record-keeping and community outreach by local organizations and law enforcement authorities has undoubtedly generated an increase in the reporting of hate incidents. However, based on the vast and steady increase in reports and the close relationships in time between events like the Persian Gulf War and Arab-bashings, and protests over the veto of AB 101—the gay and lesbian anti-discrimination bill—and gay-bashings, it seems unquestionable that there has been a very real increase in incidents.

We are able to document this in large part due to the efforts of a number of dedicated local and statewide organizations devoted to monitoring and activism around issues of human rights. Major groups who regularly report statistical summaries of incidents of hate violence include:

Group	Target Groups for Which Incidents Recorded	Region Covered
Anti-Defamation League	anti-Semitic	statewide & nationwide
Community United Against Violence	anti-gay/lesbian	San Francisco
Intergroup Clearinghouse	all	San Francisco
Klanwath	all	nationwide
LA County Human Relations Commission	all	Los Angeles County
LA Gay & Lesbian Community Services Center	anti-gay/lesbian	Los Angeles area
National Gay & Lesbian Task Force	anti-gay/lesbian	nationwide

Many community groups collect information on an informal basis through walk-in and telephone reports from victims. Some have banded together to create informal community-wide reporting and response networks. In addition, some local government-sponsored human relations commissions are beginning to attempt collection of regional statistics in the same manner LA County has done for the past 12 years.

But despite the positive efforts of all of these private groups, there is still a huge void in the area of recording incidents of hate violence.

State Senator Diane Watson sponsored legislation in 1989 to initiate the statewide collection of hate crime statistics by the Attorney General (AG). However, during the legislative process the bill, SB 202, was amended to make implementation of the collection activities contingent on funding which was never subsequently granted to the AG. Senator Watson has introduced legislation this session—SB 383—to fund that mandate.

At the federal level, the 1990 Hate Crimes Statistics Act (H.R. 1048, authored by Rep. John Conyers, D-Michigan) established a federal monitoring and data collection program. This program is not yet up and running, however, in part because it did not provide any details regarding how the U.S. Attorney General is to "acquire data" regarding hate crimes.

The media have helped to raise public awareness of the problem of hate violence by covering the efforts of local groups to record and respond to hate violence. In a number of cases, media attention has been a key to generating public outrage regarding an incident and support for the victims. It should be noted, however, that *how* the media choose to cover an incident can have a significant effect on the postscript to the incident. Coverage which emphasizes the community's response and support for the victims can have a very positive effect on the community and deter further incidents. Coverage which focuses solely on the victimization of the target can lead to copycat incidents.

STATE GOVERNMENT RESPONSES—PENALTIES AND PREVENTION

State government has been paying increased attention to the issue of hate violence over the past few years, both because of increased incidents and publicity and because of the work of community groups and a few statewide groups working on the issue. There have been numerous pieces of legislation attempting to respond to the problem, with a variety of approaches being taken.

The most significant recent legislative measure dealing with penalties for hate crimes was Senate Bill 98, the Hate Crimes Act of 1991, authored by State Senator Bill Lockyer and sponsored by Lieutenant Governor Leo McCarthy. Senate Bill 98 doubled criminal penalties for hate crimes, increased the potential civil penalty for hate crimes from $10,000 to $25,000, and removed the cap on punitive damage awards resulting from civil suits against hate crime perpetrators. The latter provision will allow plaintiffs in state courts to receive awards like that granted in an Oregon federal district court to the family of a victim of one of Tom Metzger's murderous skinhead gangs.

Several other pieces of legislation dealing with various aspects of the law covering hate violence were also passed during the 1991 session.

Assembly Bill 1009 (Roybal-Allard) added gender to the categories of motivation which indicate a hate crime. A complicating factor in making this change, however, has been the lack of an agreed-upon definition of gender-based hate crime, making it problematic for groups seeking to collect data to determine which crimes to include as gender-based (for example, sexual assault and domestic violence). Assembly Bill 1169 (Lee) removed the requirement that a victim of prejudice-based harassment legislation show a consistent "pattern and practice" of such harassment before qualifying for court-ordered injunctive relief. Assembly Bill 1094 (Polanco) required the governing authorities of the University of California and the California State University system to require campus law enforcement officials to collect and report data regarding incidents of hate violence on UC and CSU campuses.

In addition, Assemblywoman Barbara Lee introduced and moved through the Legislature the California schools Hate Violence Reduction Act, AB 1945. The bill required the State Board of Education to implement hate crimes reporting in schools, revise curriculum guidelines to emphasize further human relations education, and create guidelines for teacher and administrator in-service training to promote nondiscriminatory attitudes and practices. The Governor vetoed AB 1945, but it has been reintroduced this year in somewhat similar form as AB 2755.

Assemblywoman Lee's legislation is directed at an area which has not seen much legislative activity in the past—*the prevention of hate violence*. While it is important to establish through appropriate sanctions the fact that society will not tolerate acts of hate violence and will punish them significantly, we as a Commission come to the problem from the angle of trying to find effective ways to prevent hate violence from occurring in the first place.

A NEW RESPONSE: THE COMMISSION ON THE PREVENTION OF HATE VIOLENCE

Despite a number of studies, attention from groups like Governor Brown's Commission on Civil Rights and Attorney General Van de Kamp's Commission on Racial, Ethnic, Religious and Minority Violence, and the work of Assemblywoman Lee to address the schools component, the key area of targeting young people with efforts to prevent hate violence had not been comprehensively explored prior to the establishment of this Commission.

The Commission grew out of Lieutenant Governor Leo McCarthy's work with the Coalition of human rights organizations and individuals supporting passage of SB 98. While there was agreement on the need for strong penalties to send a message that hate violence is unacceptable, the Lieutenant Governor and many supporters of SB 98 recognized that this was only half the answer to the problem.

The other half was prevention—working to stop hate violence before it starts.

The Commission was established by Lieutenant Governor McCarthy in September 1991, and is made up of a broad coalition of community leaders, educators, legislators and law enforcement officials from around the state. Our joint purpose is to meet the need for creative solutions to the problem of hate violence that go beyond punishing it. These goals are elaborated upon in the next section.

COMMISSION GOALS

The Lieutenant Governor's Commission on the Prevention of Hate Violence defined its goals in the context of the experience many of the members had working for passage of SB 98. Having focused previously on expanding punishment for acts of hate violence, we chose to explore ways of preventing these acts from occurring.

We know that attitudes about people are formed easily at a young age and changed later in life with increasing difficulty. We also know that the vast majority of hate crimes are in fact committed by males under the age of 25. So our focus was on reaching youth.

As defined early on by the Commission membership, the goals of the Commission were:

- to refocus the issue of hate crimes in the direction of educational measures aimed at preventing future hate crimes;
- to develop innovative ways of reaching young people throughout the state with a message promoting tolerance of and appreciation for the diversity of our population, using everything from classroom education to mass media messages to community-based awareness programs for local leaders, educators and law enforcement officials;
- to work with practitioners in each of these key arenas to provide the practical grounding these innovations will need to be brought into play;
- to develop a menu of initiatives for state and local actions, both legislative and administrative, which will allow the state to meet the above goals; and, ultimately
- to create the foundation for a future emphasis on preparing the California leaders of tomorrow in all aspects of education for the diversity which they will discover is both their biggest challenge and greatest treasure.

The Commission sought to fulfill these goals by defining an agenda including meetings focusing on programs aimed at the

school environment, programs for youthful hate crime offenders, community-based programs aimed at preventing hate violence, and the role of the mass media in shaping popular attitudes. In each case, program directors, community leaders, and other experts on hate violence were asked to speak to the Commission and participate in questioning and discussion of the issues. The next section provides brief summaries of each of the five meetings convened by the Commission.

COMMISSION MEETING SUMMARIES

The following are short summaries of each of the Commission's five meetings, including a description of the agenda, the speakers in attendance, and the discussions which took place. For those interested in seeing more in-depth records of the meetings, detailed minutes for each of the Commission's meetings are available from the Lieutenant Governor's Sacramento office for a nominal fee covering printing and postage.

SEPTEMBER 24, 1991
COUNTY WATER & POWER BUILDING
LOS ANGELES
INTRODUCTION AND OVERVIEW

The Commission's first meeting focused on conducting an initial discussion of the issues, determining the overall goals and direction of the Commission, and sketching out agendas for subsequent meetings.

Four commission members were asked to give presentations to the group to help frame the issues: James McElroy, co-counsel in 1990's successful multi-million dollar lawsuit against the White Aryan Resistance; Brenda Steppes, principal of Hancock Park Elementary School, one of the most ethnically diverse elementary schools in the state; Fred Persily, independent human relations specialist and a consultant to the now-defunct Attorney General's Commission on Racial, Ethnic, Religious, & Minority Violence; and Ron Wakabayashi, executive director of the Los Angeles City Human Relations Commission, a leading community-based organization combating hate violence.

In the course of the discussion, the Commission identified four key issue areas for further exploration: the vital role of the school environment, the need for programs for youthful hate crime offenders, the growing role and effectiveness of community-based programs, and the extraordinary power of the mass media to influence youth. These four topics became the themes of the four commission meetings which followed over the next six and a half months.

NOVEMBER 18, 1991
OAK PARK COMMUNITY CENTER
SACRAMENTO
PROGRAMS & POLICIES IN THE SCHOOL ENVIRONMENT

At the November hearing the Commission heard from two panels of witnesses regarding the role of the school environment in shaping young people's attitudes toward others, and existing programs to combat prejudice and hate violence in California schools.

The first panel included Rodney Atkinson, a consultant with the Department of Education unit overseeing History/Social Sciences curriculum; Cynthia Esty, Northern California project coordinator for "A World of Difference," a classroom anti-bias curriculum developed by the ADL; and Dr. Virginia Uribe, founder of Project Ten, a high school campus-based counseling and support group for lesbian and gay teens. Discussion focused on the need for curriculum to be inclusive of all segments of the population and the difficulty in balancing the desire to see school districts utilize the state's very positive curriculum guidelines against the system's emphasis on local control.

The second panel included Assemblywoman and Commission member Barbara Lee, author of AB 1945, the California Schools Hate Violence Reduction Act; Fred Persily, author of "The Diverse Student Education Project," a proposed teacher training curriculum for the California Teachers Association, and Terry Amsier of the Community Boards, a national on-campus conflict resolution organization. Discussion focused on issues such as:

opposition to AB 1945 from supporters of "traditional values;" how to target new teachers and current teachers for diversity training; and the uses of conflict resolution programs like Community Boards.

JANUARY 7, 1992
UNIVERSITY SYNAGOGUE
LOS ANGELES
YOUTHFUL OFFENDERS/UNLEARNING PREJUDICE

The third Commission meeting brought extensive testimony from Greg Withrow, a former skinhead, former member of the White Aryan Resistance, and former leader of that group's youth recruiting network. Mr. Withrow gave a compelling account of his upbringing by a father devoted to Nazism, his deep involvement with WAR and its youth wing, and his eventual departure from the white supremacist movement and acceptance of others. He spoke at length about the philosophical underpinnings of racism, its appeal to young people, and what factors can lead them into hate groups or steer them away from racism.

The Commission engaged Mr. Withrow in a discussion of the psychology of racism and how we can either inoculate people against it or draw them away once they have become involved. He stressed the importance of exposing young people to diversity to reduce the fear of the unknown, and suggested that alternative sentencing may be productive in giving young hate crime offenders an opportunity to learn about their victims and why they need not fear them.

The second panel focused on methods of "unlearning" prejudice that may be applicable to youthful hate crime offenders, and included Ed Wilder, assistant deputy director for institutions and camps of the California Youth Authority, and Dr. Norman Miller of the University of Southern California.

Mr. Wilder provided an overview of the CYA's handling of hate crime offenders, noting that they are not singled out for any special attention or programs but go through the same process of group and solo counseling designed to address the crime for which they were sentenced. Dr. Miller reviewed his extensive research

into teaching methods that break down our tendencies to group ourselves with those we resemble and against those who are dissimilar. Discussion focused on CYA counseling and staff training procedures and the practical applications of Dr. Miller's research to classrooms and youth facilities.

FEBRUARY 24, 1992
JAPANESE AMERICAN CITIZENS LEAGUE
SAN FRANCISCO
COMMUNITY-BASED APPROACHES TO PREVENTING HATE VIOLENCE

The San Francisco meeting featured representatives from two local government-sponsored, community-based comprehensive anti-hate violence programs: the San Francisco Hate Violence Reduction Plan and the Alameda County Hate Violence Prevention Plan.

The first panel included Ron Dudum, co-chair of the Intergroup Clearinghouse, a San Francisco-based coalition of community groups working with city agencies and community organizations to implement its plan; Linda Davis, deputy superintendent of the San Francisco Unified School District; and Officer Sandi Bargioni of the San Francisco Police Department's Hate Crimes Unit. Each discussed the components of the plan and the extensive cooperation and coordination between public and private agencies with widely varying jurisdictions and missions. The Commission's subsequent questions and discussion focused on the importance of building a relationship of trust between community groups and local government authorities, reporting and personnel training issues, and funding.

The second panel consisted of Vince Reyes, a Commission member and multicultural multilingual coordinator for Alameda County, and Michael Wong, aide to Alameda County Supervisor Don Perata. Mr. Reyes and Mr. Wong were two of the principal authors of Alameda County's plan, and they reviewed briefly its components and progress toward implementation. Their presentation and the pursuant discussion focused substantially on the need

to make human relations programs a budget priority for all levels of government.

APRIL 2, 1992
LOS ANGELES GAY & LESBIAN COMMUNITY
SERVICES CENTER
LOS ANGELES
ROLE OF THE MASS MEDIA

The final meeting of the Commission had as its theme the vital role the mass media play in shaping young people's—and society's in general—attitudes regarding others.

Presenters to the Commission included Norman Fleishman, an independent media consultant working to bring important social issues into regular entertainment media; Richard Jennings, executive director of Hollywood Supports, an entertainment industry group dedicated to positive industry treatment of gay and lesbian people; and Henry Bromell and Kevin Arkadie, executive story editor and story editor of "I'll Fly Away," a weekly NBC television program focusing on race relations in the deep South in the early days of the civil rights movement.

Each presenter acknowledged the tremendous power the media have to influence social mores, set standards and project value judgments to the general population. The discussion between the Commission and the panel focused on methods to encourage better portrayals and better programming in general without encroaching on free speech. There was a consensus that a positive approach had the greatest potential to succeed.

FINDINGS AND RECOMMENDATIONS

1. LEADERSHIP/AWARENESS

During its five meetings, the Commission's discussions repeatedly returned to the role government officials and other community leaders play in setting the public agenda and shaping the public's perceptions of issues. In recent years many political leaders have employed charged terms to play on public fears for

their own short-term political gain. Some have gone as far as manipulating images in television commercials in order to provoke a response. Powerful images of white workers losing jobs to minority applicants and extreme depictions of gay and lesbian people designed to shock middle American sensibilities are just two examples of this dangerous phenomenon.

Leaders today need to have the political will to devote scarce resources to preventing and responding to hate violence. The Commission heard testimony expressing frustration with the resistance of the California Attorney General to reallocate expenditures to implement legislation calling for the collection of hate crime reports from all California law enforcement agencies. In addition, the Commission heard testimony that the federal Hate Crime Statistics Act does not mandate local police departments to identify and report hate crimes. Therefore, neither California nor the federal government can provide accurate information on the level of hate violence, the groups affected and the areas of the state in most need of attention.

Recommendations:

1. Political and other leaders in society need to set a responsible example by refusing to resort to the use of racist, anti-immigrant, anti-Semitic and homophobic ploys for political gain. Tolerance and respect for human diversity are the fundamental values upon which this nation was founded.

2. Legislation should be enacted requiring law enforcement agencies and schools to report incidents of hate violence.

3. The California Legislature and the Governor need to give state and local programs that prevent and respond to hate violence the same priority for funding given to institutions that incarcerate perpetrators of hate crimes.

4. The Commission should, by letter accompanying a copy of this report, strongly urge all major officeholders and candidates for major office in California to speak out regarding the rise of hate violence in our society, identify what they believe to be the causes of this phenomenon, and how they propose to respond to it.

5. The Commission should, by letter accompanying a copy of this report, urge local governments throughout California to recognize and publicly acknowledge and address the problem of hate violence in their community.

2. SCHOOLS

Schools, as the point of contact between government and youth, should serve as the key component of public policy to prevent violence motivated by prejudice and bigotry. However, the Commission has heard testimony that:

— Reported incidents of hate violence on school campuses may represent only the tip of the iceberg. Indeed, a Los Angeles County survey of hate violence incidents in a number of LA County schools indicates that more incidents may occur on school campuses than in the community at large;

— Some curriculum and programs currently relied on by schools to "promote appreciation for diversity' may be ineffective in preventing hate violence according to research studies on the formation of prejudice. The Commission received testimony that how teachers teach may be equally or more important in reducing hate violence than curriculum and programs designed to promote tolerance and understanding;

— Teaching staff in California is approximately 80 percent white, while a majority of students are nonwhite; and

— Teachers receive minimal training in bias reduction and conflict resolution techniques in the course of meeting credentialing requirements.

As part of this effort, we must redouble our efforts to solve problems such as class size and school violence and other obstacles that get in the way of teachers reaching out to and communicating effectively with their students.

We also recognize the important role the California State University system must play in helping teachers address these issues, because CSU trains 70 percent of the teachers in the state.

Findings:

1. Schools must take immediate action to monitor and respond to hate violence on the campus.
2. Teachers need to be trained to use cooperative learning techniques that will counter prejudicial attitudes and predispositions to hate violence.
3. Teachers need to be trained to work effectively with students from diverse racial and ethnic backgrounds who speak English with varying levels of proficiency and who have a broad range of educational experience.

Recommendations:

1. Legislation should be enacted to require school districts to record and report incidents of hate violence occurring in public elementary, middle and secondary schools. A sample incident-reporting form used by the San Francisco Unified School District is included as Appendix 3.
2. Legislation should be enacted to require school site committees to be expanded to include students and concerned community residents and to
   a. monitor:
      1) access of students to appropriate areas of the campus regardless of their race, religion, ethnicity, gender, sexual orientation or disability;
      2) access for students to participate in appropriate school activities, clubs, etc., regardless of their race, religion, ethnicity, gender, sexual orientation or disability;
   b. draft and update annually a plan for promoting and improving human relations on the campus;

c. consider the use of conflict resolution programs as one method to prevent bias-related incidents from escalating into hate violence;

d. consider the implementation of "buddy systems" matching new students with more experienced students to help integrate them successfully into the school environment.

3. Minimum standards for the granting of a teaching credential in California should be expanded to require the completion of coursework in:

   a. the causation of prejudice and bias-reduction techniques;

   b. communication with students from diverse backgrounds;

   c. conflict prevention and resolution;

   d. the use of cooperative learning techniques and student-based classrooms to overcome prejudice;

   e. the preparation and presentation of bias-free curricula, including the history, culture and contribution to society of all the major groups making up the school population.

4. Legislation should be enacted to require every teacher to complete an in-service training program including the elements enumerated in Recommendation 3 above at least once every five years.

5. Diversion, alternative sentencing, and other youth programs driven by the criminal justice system need to include intervention strategies for perpetrators of hate violence.

6. Youth Authority and juvenile probation staff, and juvenile court judges and referees need to identify cases involving hate violence and apply appropriate intervention strategies. Managers of juvenile detention facilities need to implement programs to prevent bias-related

incidents and adopt protocols to identify and respond to acts of hate violence.

Recommendations:

1. Legislation should be enacted to require directors of all youth programs receiving state funds to complete training in preventing and responding to hate violence.

2. The Office of Criminal Justice Planning and the California Youth Authority should sponsor regional meetings of state-funded programs serving youth and offer workshops that include, but are not limited to:

   a. identifying and responding to hate violence;

   b. conflict resolution and other effective interventions for preventing hate violence;

   c. cooperative approaches by community-based programs to intervene with youthful perpetrators of hate violence;

   d. coordinating hate violence intervention activities with criminal justice agencies;

   e. coordinating hate violence intervention activities with schools.

3. The Office of Consumer Affairs should recommend the inclusion of activities designed to prevent and respond to hate violence by dispute resolution programs within their jurisdiction.

4. Workshops on employing effective intervention techniques in alternative sentencing and diversion for perpetrators of hate violence should be offered as part of the continuing education program for judges and juvenile court referees. Legislation should be enacted to require probation officers to receive training in the application of intervention programs for juvenile perpetrators of hate violence.

5. Legislation should be enacted to require the California Youth Authority to require youth detention facilities to

implement programs to prevent hate violence and to adopt protocols for monitoring and responding to bias-related incidents.

6. Legislation should be enacted requiring the court in juvenile hate crime cases to consider, as a sentence component, community service in a setting appropriate to the individual's biases. For example, if the crime manifested prejudice against African Americans and the suggested sentence for the crime is 90 days in a Youth Authority camp, one option might be for the perpetrator to be sentenced to 400 hours (10 weeks) of community service at a public facility in a community which is predominantly African American. This option should be exercised at the court's discretion based on their case-by-case assessment of the probability of a positive outcome from alternative sentencing.

4. COMMUNITY-BASED EFFORTS

Compelling testimony was received indicating that hate violence is inversely proportional to the state of the economy. Unfortunately, this has resulted in the greatest need for mobilizing public and community-based services to prevent and respond to hate violence coming at times when resources are already stretched to their limits. Many existing human relations programs have been under-funded or not funded at all in the most recent fiscal year. If people are to live together in harmony when resources are scarce, public agencies need to place efforts to support programs designed to prevent hate violence at the top of the list of priorities when the economy is declining.

Findings:

A number of communities have developed plans for dealing with hate violence locally. These plans offer useful ideas which can serve as models for local government units up and down the state.

Examples of initiatives taken by local governments and community coalitions around the state include:

- working with local boards of education, teachers and school district staffs on developing in-school prevention strategies;
- training community agencies to take reports of hate violence and refer victims to legal assistance, professional counseling and other services;
- establishing hate crime units in police departments and district attorneys' offices;
- establishing hate crime reporting and victim's assistance hotlines;
- training police officers in identifying and investigating hate crimes; and
- instituting hate crimes reporting in schools.

Further information regarding local programs is provided in Appendix 2—Resource Directory.

Recommendations:

1. Local governments, as well as the California Legislature and the Governor, need to give programs that prevent and respond to hate violence the same priority for funding given to institutions which incarcerate perpetrators of hate crimes. Similar to the area of health care spending, dollars spent now on prevention will save many more dollars in the future that might otherwise have to be spent on incarceration.

2. Local governments should establish close ties of cooperation and information exchange with independent community organizations which address issues related to hate violence. Many effective programs and services are being provided by independent community groups (examples are listed in Appendix 1). Local authorities should identify the groups active in their area and work with these organizations to make the entire community aware of their presence and activities. Cooperative ef-

forts are needed to overcome language and cultural barriers to reach immigrant populations. Public and private resources should be pooled to reach common goals for the community.

3. Legislation should be enacted requiring the Commission on Peace Officer Standards and Training to implement standard police training procedures for basic academy training, field training, and advanced officer and management training with respect to cultural differences and hate crimes.

5. MASS MEDIA

During this last decade of the 20th century, young people learn attitudes and prejudices not just from relatives and friends but also from television, movies, music, newspapers, magazines—the entire range of mass media which bombard them every day. Young people are simultaneously the most attracted to mass media output and the most vulnerable to being influenced by what they see and hear.

Findings:

1. Mass media generally have not been successful in portraying minorities as realistic, well-rounded characters. Stereotyping and invisibility are still very real problems. One study shows that of 569 regular characters on an average week of TV network programming, only 12 were Jewish, 9 Latino, 5 gay or bisexual, 3 Asian/Pacific, 2 Native American and 1 Arab American.

2. The Commission heard testimony describing the media as an institution that has at times promoted attitudes of bigotry and created conditions conducive to the perpetration of hate violence. Providing a public forum for organizations which promote hate violence has helped to give them an aura of respectability.

3. The Commission heard testimony that a resources directory exists for television writers who seek input from certain community organizations when writing about

members of their respective communities. A similar directory for news-gathering organizations could be extremely useful.

Recommendations:

1. Television and cable networks and stations should make a commitment to a periodic (perhaps week-long) focus on diversity and tolerance in their programming, taking their cue from past broadcast and print media collaborations which focus on particular themes and issues, such as drugs, hunger and homelessness. Intergroup relations are a fundamental, universally relevant issue for all forms of programming—drama, comedy, documentaries and the arts. Industry leaders should come together to concentrate on this issue and try to create an event that would motivate the widest possible participation.

2. Programming which is directed specifically at a young audience carries a special responsibility to be sensitive and to present positive values. A good example of the idea noted in Recommendation 1 above is the collaboration last year which resulted in a block of Saturday morning cartoon programs on all three major networks that shared an anti-drug message. We hope this apparent awareness of the need for responsible presentation of youth-oriented material extends to the issues addressed in this report and, further, to a recognition that programming which consistently portrays violence as an acceptable, or even favored, avenue of resolving conflicts promotes physical violence in the real world.

3. Leaders in the broadcast entertainment industry should make a commitment to developing and promoting more quality programs featuring an examination of the issues surrounding diversity and prejudice, especially shows which reach a young audience. Examples of prime time shows in this vein include "I'll Fly Away," "A Different World," "Roseanne," "LA Law," "Northern Exposure," and "Life Goes On"; examples of shows aimed primarily at a young audience include "Sesame Street," "Reading

Rainbow," and the network after-school specials. Another important element that these shows all have in common is their proven ability to entertain and even thrill a large audience without resorting to gratuitous violence.

4. The governing bodies which annually present the Academy Awards, Emmy Awards, Tony Awards and Grammy Awards should each develop a new award, named for a significant entertainment industry figure known for his/her opposition to all forms of prejudice and discrimination, and present it annually to the motion picture, television program, stage production or musical composition which best exemplifies those principles.

5. Community leaders and entertainment industry leaders should support and continue to develop and promote special awards for programming which intelligently and sensitively addresses intergroup relations, issues and understanding. Examples of existing awards of this type include the NAACP's Image Awards and the GLAAD/LA's Media Awards.

6. Many news programs have done an admirable job of exposing the public to the extent and seriousness of the hate violence problem in California, and they deserve praise for their coverage. They should consider providing a service to the public by drawing attention to positive developments in the area of intergroup relations, such as supportive community responses to incidents of hate violence.

7. Individual news organizations should develop resource directories for their reporting staffs to assist them in getting community reactions to and perceptions about issues and incidents, including hate violence, which affect them uniquely.

8. Representatives of the "minority' and mainstream electronic and print media should begin working to develop techniques for reporting intergroup activities and conflicts in a way that would promote harmony rather than division among the population.

6. PENDING LEGISLATION ENDORSED BY THE COMMISSION:

AB 2755 (Lee)	California Schools Hate Violence Reduction Act (1992 version of last year's AB 1945). Requires State Board of Education to adopt policies and guidelines to prevent and respond to acts of hate violence in California schools, including revising state curriculum guidelines, teacher and administrator in-service training programs, and the establishment of a reporting system for in-school incidences of hate violence.
AB 3407 (Klehs)	Requires the Commission on Peace Officer Standards and Training to develop by December 31, 1993, standard police training guidelines and a course of instruction and training addressing hate crimes.
SB 363 (Watson)	Appropriates $132,000 to the Department of Justice to implement existing hate crimes reporting requirements which are currently not being met due to a lack of funding.
SB 1408 (Torres)	Requires the Commission on Peace Officer Standards and Training to implement by July 1, 1993, standard police training procedures for basic academy training, field training, and advanced officer and management training with respect to cultural differences and hate crimes.
SB 1427 (Roberti)	Requires the Department of Justice to develop model programs to assist communities in dealing with hate crimes; requires the Department to develop and implement a hate crimes reporting database.